

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

PLYMOUTH COUNTY RETIREMENT
ASSOCIATION, on Behalf of Itself and
All Others Similarly Situated,

Plaintiffs,

v.

PRIMO WATER CORPORATION; et
al.,

Defendants.

No. 1:11-cv-01068-TDS-PTS

**PRIMO DEFENDANTS’
RESPONSE TO EMPLOYEE
RETIREMENT SYSTEM OF THE
GOVERNMENT OF THE
VIRGIN ISLANDS’ MOTION
FOR APPOINTMENT AS LEAD
PLAINTIFF AND APPROVAL
OF SELECTION OF LEAD
COUNSEL**

Defendants Primo Water Corporation, Billy D. Prim, Mark Castaneda, David J. Mills, Richard A. Brenner, David W. Dupree, Malcolm McQuilkin, David L. Warnock, and Jack C. Kilgore (collectively, “Primo Defendants”) respectfully submit this response to the motion of Plaintiff Employees’ Retirement System of the Government of the Virgin Islands (“VI Retirement System”) for its appointment as lead plaintiff and for approval of VI Retirement System’s selection of Robbins Geller Rudman & Dowd LLP as lead counsel and McDaniel & Anderson, LLP as liaison counsel.

Primo Defendants take no position regarding the appointment of VI Retirement System as lead plaintiff or the approval of VI Retirement System’s selection of lead counsel. Primo Defendants, however, reserve their rights under Rule 23 of the Federal Rules of Civil Procedure to challenge, among other things, the adequacy of any lead plaintiff or the typicality of its claims, if and when the Court considers a motion for class certification. Primo Defendants also reserve their rights to challenge VI Retirement

System's satisfaction of other requirements to act as lead plaintiff or its standing to litigate the claims that the extant complaint asserts.

Pursuant to the Private Securities Litigation Reform Act of 1995 ("Reform Act"), 15 U.S.C. § 78u-4, now is not the appropriate time for Primo Defendants to raise issues challenging the propriety of class certification, including any proposed lead plaintiff's qualifications to represent the putative class (*e.g.*, typicality, adequacy and other matters), or VI Retirement System's standing to litigate certain claims. As a threshold matter, courts within the Fourth Circuit have not resolved the issue of whether defendants have standing to object to a lead plaintiff motion. *Compare Johnson v. Pozen, Inc.*, No.1:07-CV-00599, 2008 WL 474334, at *1 n.2 (M.D.N.C. Feb. 15, 2008) ("The consensus among courts is that Defendants have no standing to object to the proposed Plaintiff's motion"); *with In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638, 641 (W.D.N.C. 2000) (noting that while courts have split on whether securities defendants have standing to challenge lead plaintiff motions, nothing prevents court from considering defendants' arguments in opposition to the motion). Whatever the answer to this question, "[a] wide ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left for the Court's later consideration of a motion for class certification." *In re USEC Sec. Litig.*, 168 F. Supp. 2d 560, 566 (D. Md. 2001); *In re e.spire Commc'ns, Inc. Sec. Litig.*, 231 F.R.D. 207, 214 (D. Md. 2000).

At this time, the Court need only make a preliminary determination as to the proposed lead plaintiff's claims of typicality and adequacy. *See* 15 U.S.C. § 78u-4(a)(3)(B). This preliminary determination has no bearing on the Court's subsequent consideration of these issues for purposes of class certification. *See* Joint Explanatory

Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-369, at 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (“The provisions of the bill relating to the appointment of a lead plaintiff are not intended to affect current law [under Fed. R. Civ. P. 23] with regard to challenges to the adequacy of the class representative or typicality of the claims among the class.”); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 60 (D. Mass. 1996) (court’s “determination to appoint a person or persons as lead plaintiff must be without prejudice to the possibility of revisiting that issue in considering a motion for class certification”); *Fields v. Biomatrix, Inc.*, 198 F.R.D. 451, 457-58 (D.N.J. 2000) (court’s preliminary determination as to adequacy and typicality does not preclude defendants “from later contesting class certification on these bases”).

At this juncture, and without the benefit of discovery (should any be ultimately appropriate) Primo Defendants have not had an adequate opportunity to explore VI Retirement System’s fitness to represent the putative class. At the appropriate time, Primo Defendants may challenge the qualifications, under Rule 23 or otherwise, of VI Retirement System or any other lead plaintiff or named plaintiff. Primo Defendants accordingly reserve their rights to pursue such a challenge at a later date as well as to challenge VI Retirement System’s standing to litigate the claims it may assert.

This 23rd day of February, 2012.

/s/ Kiran H. Mehta

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Response to Employee Retirement System of the Government of the Virgin Islands' Motion for Appointment as Lead Plaintiff and Approval of Selection of Lead Counsel* was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to the registered participants, as follows:

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This 23rd day of February, 2012.

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